

No. 44264-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

KRIS A. SAEGER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 12-1-00360-2

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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360-427-9670 ext. 417

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Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred because it did not enter formal, written findings of fact and conclusions of law following a bench trial. However, the because the trial court gave detailed oral findings and conclusions, the error is harmless and the verdicts should be sustained. In the alternative, the matter should be remanded to the trial court for entry of formal, written findings as required by CrR 6.2(d).
2. The trial court entered boilerplate findings in the judgment and sentence which stated that Saeger has the ability to pay legal financial obligations ordered by the court, but the record contains no recitation of specific facts regarding Saeger's assets or resources or his ability to pay. Where the record shows that the trial court considered a potential hardship to Saeger due to a disability that contributed to his indigency and that the trial court, therefore, set the minimum payment for financial legal obligations at \$25 per month, is the record sufficient to sustain the court's imposition of costs?

B. FACTS AND STATEMENT OF THE CASE

On September 5, 2012, Salvador Gaspar-Guerrero lived on Martin Road in Shelton, Washington, with his wife Dawn Gaspar-Guerrero, his daughter Vivian, two other children. RP 14-15, 34-35. Jose Casterina, his wife, and their two or three children, live on the same property. RP 15-16, 35. Kris Saeger lived on the property next door. RP 16, 60.

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On September 5, 2012, Salvador Gaspar-Guerrero went to bed around 9:30. RP 19. But he was unable to sleep because of noise next door at Saeger's residence, where Saeger had a campfire and loud music. RP 19-20. Salvador Gaspar-Guerrero and his wife heard other noises, too, such as banging, and they became concerned that something was going on outside. RP 20-21, 37. Salvador got up to check, and when he went out he saw Saeger and Jose arguing. RP 21. As Salvador listened to the argument, he heard Saeger tell Jose, "I'll blow you all up." RP 22, 38. Salvador told Saeger that he had called the police and that they were on the way, to which Saeger responded, "I'll blow them up too." RP 22. Salvador understood Saeger's words as a threat to kill. RP 24-25. And because Saeger was drunk, Salvador believed that Saeger would carry out the threat. RP 27-28. Dawn listened as Saeger threatened to blow them all up, and she, too, believed that he would carry out his threats to kill them all. RP 38-39.

Vivian Gaspar-Guerrero, who was sixteen at the time, woke up to the sound of a disturbance outside. RP 47-48, 50. Vivian, too, heard Saeger say that he was going to blow them all up. RP 50-51. And she, too, believed that Saeger would carry out his threats. RP 51.

Later in the evening, sheriff's deputies arrested Saeger for harassment because of his threats to kill Salvador, Dawn, and Vivian. RP 57-58, 60-61. The State charged Saeger with three counts of felony harassment, based upon his threats to kill Dawn, Salvadore, and Vivian. CP 16-17. Following a bench trial, the court found Saeger guilty on each count. RP 88-89. At the conclusion of the trial, the court delivered the following oral findings of fact and conclusions of law:

Hearing the testimony of the witnesses, being able to view the witnesses' demeanor, each of them, and listening to their testimony, also being able to view the one exhibit that was admitted into evidence, the Court will make the following findings.

The Gaspar-Guerrero family live at 3290 West Martin Road, Shelton, Mason County, Washington. The family consists of Mr. Salvador Gaspar-Guerrero, his wife Dawn, his 17-year-old daughter Vivian, and two younger children. Also on this property, a friend of the Gaspars is residing in a travel trailer with his wife and two children. The friend's name is Jose. Next to the Gaspar family, Mr. Saeger lives, defendant in this case, and the two families have lived side by side for many years.

They are well acquainted with each other, and on September 5th, 2012, Mr. Saeger was outside by his fire pit playing his music loudly. He had been drinking. The Gaspar family went to bed between 8:30 and 9:30 p.m., and in addition to the loud music continuing, there were noises heard from the outside. Mr. Gaspar got up to check out the noises, and Ms. Dawn Gaspar also got up. She went out onto the porch as did their 17-year-old daughter Vivian. Mr. Saeger was heard arguing with Jose, the individual residing in the travel trailer. Mr. Gaspar walked toward the travel trailer and although he could not be seen from the porch of the Gaspar home once he got to the porch of the trailer, he could be clearly heard as could Mr. Saeger.

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Mr. Saeger was speaking loudly. In fact, he was yelling. And he stated he was going to blow you all up and I'm going to shoot you all. Mr. Saeger knows that the Gaspar-Guerrero family live in the home, and the comment was heard by Salvador, Dawn and Vivian. They all heard the yelling. They all heard the context in which it was said. It was clearly not said in jest or as a part of a joke, and the three of them believe that the comment was directed toward them individually and the entire Gaspar-Guerrero family. Each of the individuals, Salvador, Dawn and Vivian, took this as a death threat, and it is reasonable that they did so based upon the context in which it was said, the demeanor that they could at least hear if not see because they -- at least Dawn and Vivian couldn't see around the travel trailer -- and the past experience with Mr. Saeger in which there had been at least one previous threat that had resulted in a conviction of Mr. Saeger for harassment in the past.

The Court will find and conclude that Mr. Saeger knowingly threatened to kill Salvador Gaspar, Dawn Gaspar and Vivian Gaspar, and the entire Gaspar family. That he did so knowingly. That he knew that they were all living in close proximity. By his words and conduct, he placed each of them in reasonable fear that the threat would be carried out, and Mr. Saeger had no lawful authority to make the threat.

What I found most interesting about listening to the testimony was the lack of rancor in the voices of the witnesses. They didn't appear to be here out to get Mr. Saeger for something. They -- at least one or more of them acknowledged that when Mr. Saeger is sober, a good person and good to interact with, but that when he is under the influence, which he was on that particular evening, he's scary. And it was -- that flavor came through of their testimony the whole time. That they're even more than live and let live people. They really are recognizing that Mr. Saeger once he's intoxicated is scary but other than that, he's not.

So the Court is finding that the elements in Count I as to Dawn Gaspar, the elements as in Count II as to Salvador Gaspar, and the elements as to Count III Vivian Gaspar, each of those counts have been proven by the evidence beyond a reasonable doubt, and the Court will find Mr. Saeger guilty of three counts of felony harassment threat to kill.

RP 86-89.

When the parties appeared for sentencing, the prosecutor informed the court as follows:

... I just realized -- I've prepared the Findings and Conclusions for this case; however, they're in my office. I did forget to bring those over this morning. I don't know if the Court wishes to deal with that. We do have a victim here.

RP. 92. The court responded: "Let's go ahead with the sentencing if defense is ready." RP 92. The sentencing then proceeded. RP 92-102. No citation to the record was located where written findings of fact and conclusions of law were entered.

At the sentencing, in addition to a period of incarceration, the trial court ordered Saeger to pay the following costs and fees: \$200 filing fee, \$500 victim impact fee, \$260 sheriff return of service fees, \$100 DNA fund, and \$850 for recoupment of court-appointed attorney fees.

RP 100. The trial court noted the "limited income that Mr. Saeger must have through his disability" and, therefore, set Saeger's payments at a rate of \$25.00 per month. RP 100.

C. ARGUMENT

1. The trial court erred because it did not enter formal, written findings of fact and conclusions of law following a bench

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trial. However, the because the trial court gave detailed oral findings and conclusions, the error is harmless and the verdicts should be sustained. In the alternative, the matter should be remanded to the trial court for entry of formal, written findings as required by CrR 6.2(d).

CrR 6.1(d) requires entry of written findings of fact and conclusions of law following a bench trial. *State v. Head*, 136 Wn.2d 619, 621–22, 964 P.2d 1187 (1998).

The purpose for requiring findings and conclusions is to “enable an appellate court to review the questions raised on appeal.” *Id.* at 622. Each element must be addressed individually, setting out the factual basis for each conclusion of law. *Id.* at 623; *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each finding must also specifically state that an element has been met. *Banks*, 149 Wn.2d at 43 (citing *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)). Absent prejudice to a defendant from the failure to enter the findings and conclusions, the proper remedy is remand to the trial court for entry of findings. *Head*, 136 Wn.2d at 624.

However, remand is not required if the failure to comply with CrR 6.1(d) is harmless. *Banks*, 149 Wn.2d at 43–44. The error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* at 44.

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PO Box 639
Shelton, WA 98584
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When announcing its verdicts orally, the trial court in the instant case stated that it was finding that each of the elements in regard to each of the three counts of the information were proved beyond a reasonable doubt. RP 88-89. And, the trial court summarized the facts that it relied upon to reach its verdicts. RP 86-89. Thus, the trial court's findings and conclusions were sufficient to sustain the verdicts, but because the findings and conclusions were not reduced to writing for the record, error occurred. CrR 6.1; *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). But here, the error is harmless, because the error in no way contributed to verdict or otherwise prejudiced Saeger. *State v. Banks*, 149 Wn.2d at 43-44. Where a trial court's written are incomplete or inadequate, a reviewing court may look to the oral findings. *State v. Robertson*, 88 Wn. App. 836, 843, 947 P.2d 765 (1997). The trial court's oral findings were detailed and sufficiently outlined the trial court's reasoning and decision. RP 86-89. Therefore, notwithstanding the erroneous omission of written findings and conclusions in this case, the trial court record is sufficient to allow review of the trial court's decision, and the erroneous omission of a written document is harmless. *State v. Banks*, 149 Wn.2d at 43-44; *State v. Robertson*, 88 Wn. App. 836, 843, 947 P.2d 765 (1997).

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

2. The trial court entered boilerplate findings in the judgment and sentence which stated that Saeger has the ability to pay legal financial obligations ordered by the court, but the record contains no recitation of specific facts regarding Saeger's assets or resources or his ability to pay. Where the record shows that the trial court considered a potential hardship to Saeger due to a disability that contributed to his indigency and that the trial court, therefore, set the minimum payment for financial legal obligations at \$25 per month, is the record sufficient to sustain the court's imposition of costs?

The trial court in the instant case acknowledged that Saeger suffers a disability that would probably limit his future income and his future ability to pay the costs and fees imposed by the court. RP 100. However, not all the costs and fees ordered by the court were discretionary. The \$200 filing fee, the \$260 sheriff's service fee, and \$850 attorney fees were discretionary. RCW 9.94A.760; RCW 10.01.160. But the \$500 crime victim fee and the \$100 DNA fee are mandatory. RCW 7.68.035; RCW 43.43.7541. See, *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166, 168 (1992), citing *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984).

In regard to discretionary costs, however, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). Additionally, "[i]n determining the amount and method of payment of cost, the court shall take account of the

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PO Box 639
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financial resources of the defendant and the nature of the burden that payment of costs will impose.” Id.

In the instant case, the only citation to the record that was located where the sentencing court considered the financial burden that the payment of costs would impose upon Saeger appears where the court set the payments at a rate of \$25 per month due to the “limited income that Mr. Saeger must have through his disability.” RP 100.

Generally, the court may not order discretionary costs unless the defendant will be able to pay. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); *State v. Barklind*, 87 Wn.2d 814, 817-18, 557 P.2d 314, 317 (1976). In the instant case there are facts showing that the defendant suffers a disability that contributes to his indigency, and there is no citation to the record to show that the disability is expected to end; thus, there is no expectation that the indigency related to the disability will end. RP 100. The court should not order discretionary costs unless there is some likelihood that the indigency will end. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

However, it is not clear that Saeger’s assignment of error on this point is ripe for review. Generally, a convicted criminal defendant may not raise issues related to legal financial obligations for the first time on

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PO Box 639
Shelton, WA 98584
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appeal where the alleged error was not preserved by an objection at the trial court. *State v. Blazina*, ____ Wn. App. ____, 301 P.3d 492 (No. 42728-1-II, May 21, 2013). Where, however, the record shows that the defendant suffers a disability that contributes to his indigency, the issue may in appropriate cases be raised for the first time on appeal. *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011); see also, *State v. Blazina*, ____ Wn. App. ____, 301 P.3d 492, 494 (No. 42728-1-II, May 21, 2013).

In the instant case, as in *Bertrand*, the trial court's finding of the defendant's ability to pay is supported only by boilerplate language in the judgment and sentence. CP 7-8. The trial court's statement, that it was setting Saeger's payments at \$25 per month because his disability might limit his ability to pay costs, suggests that the trial court knew of and considered Saeger's indigence and that it found that he had the ability to pay \$25 per month. If this was the trial court's finding, however, it is not clearly articulated in the record and is not supported by any specific references to Saeger's assets or other resources. But the trial court was not required to enter formal, written findings regarding Saeger's ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166, 168 (1992).

Additionally, Saeger's ability to pay should be examined when the payment is due, rather than when it is ordered. *State v. Baldwin*, 63 Wn.

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

App. 303, 310–11, 818 P.2d 1116 (1991). While the findings in the instant case are not specific and while the record does not describe the financial resources of the defendant or the burden that these financial obligations will place upon him, the record is sufficient to show that the trial court at least took into account Saeger's resources and his future ability to pay when it set the payment schedule at \$25 per month. RP 100. Where the record is sufficient to show that the trial court took into account the financial resources of the defendant and the nature of the burden imposed by the obligations, the trial court's imposition of costs is not clearly erroneous. *Bertrand*, 165 Wn. App. at 404. On the other hand, the record of the instant case, like the record in *Bertrand*, contains no evidence regarding defendant's future ability to pay legal financial obligations. See, *id*.

However, the trial court in the instant case set Saeger's payments at the minimum level of \$25 per month. RP 100. The record shows that the court was aware of and considered Saeger's ability to pay when it set the minimum payment. *Id*. Additionally, RCW 10.01.160(4) provides a process that Saeger can follow to seek relief from the minimum payment if due to involuntary indigency or other involuntary hardship he is unable to

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360-427-9670 ext. 417

pay as ordered without undue hardship. *State v. Curry*, 118 Wn. 2d 911, 914, 829 P.2d 166, 167 (1992).

Accordingly, the State avers that the trial court's order that Saeger pay \$25 per month toward the legal and financial costs ordered by the court after his conviction in the instant case should be sustained on appeal.

D. CONCLUSION

The trial court erred by not entering the findings of fact and conclusions of law as required by CrR 6.2(d) following a bench trial. However, the trial court entered detailed oral findings and conclusions, and Saeger suffered no prejudice due to the absence of written findings. Therefore, the State avers that the error is harmless and that Saeger's convictions in this case should be affirmed. In the alternative, the State avers that the case should be returned to the trial court for entry of formal, written findings and conclusions that are in compliance with CrR 6.2(d).

The trial court record does not contain a reference to specific financial assets and resources available to Saeger or to specific financial needs that he has now or in the future, but the court did take into account the hardship or potential hardship to Saeger due to court's imposition of

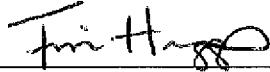
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legal financial obligations upon him. Based upon the court's recognition of this potential hardship, the court set payments at the rate of \$25 per month. Because the court considered the potential hardship upon Saeger, and because Saeger has the ability under RCW 10.01.160(4) to seek future relief from the court's order, the State avers that the court's order for the payment of costs in this case should be sustained.

DATED: July 9, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

MASON COUNTY PROSECUTOR

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